

1 Department of Labor and Industry
2 Board of Personnel Appeals
3 PO Box 201503
4 Helena, MT 59620-1503
5 (406) 444-2718
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8 STATE OF MONTANA
9 BEFORE THE BOARD OF PERSONNEL APPEALS

10
11 IN THE MATTER OF THE UNFAIR LABOR PRACTICE CHARGE NO. 41-2010

12
13 HEATHER GALLAGHER HUTZENBILER,)
14 Complainant,)
15 -vs-) INVESTIGATIVE REPORT
16) AND
17 STATE OF MONTANA, OFFICE OF THE) NOTICE OF INTENT TO DISMISS
18 STATE PUBLIC DEFENDER,)
19 Defendant,)
20)
21)

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23 * * * * *

24 **I. Introduction**

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26 On June 15, 2010, Heather Gallagher Hutzenbiler, appearing pro se, filed an unfair
27 labor practice charge with the Board of Personnel Appeals alleging that the Office of the
28 State Public Defender, hereinafter OPD, committed an unfair labor practice when Ms.
29 Hutzenbiler "was terminated without cause which was determined by the
30 Unemployment Division". In further refinement of her complaint Ms. Hutzenbiler
31 specified that the OPD violated 39-31-401(4) MCA, paraphrased by her as "Discharge
32 employee for filing and/or complaining about mistreatment of said employee."
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35 The State of Montana, OPD filed an Answer to the charge with Greg Martin, Labor
36 Relations Specialist from the State Office of Labor Relations, responding on behalf of
37 OPD and denying that the OPD committed an unfair labor practice.
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39 John Andrew was assigned by the Board to investigate the charge and has
40 communicated with the parties and exchanged information as necessary. The final
41 submission from Mr. Hutzenbiler was received by the investigator on July 12, 2010.
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43 **II. Findings and Discussion**

44
45 Heather Gallagher Hutzenbiler began her employment with the OPD as an
46 Administrative Assistant/Office Manager in the Billings office. Ms. Hutzenbiler's
47 employment ended in January of 2010, with her final paycheck covering the period
48 through January 29, 2010. Ms. Hutzenbiler's actual last day in the office was the
49 morning of January 28, 2010.
50

1 When she began her employment with OPD on June 16, 2008, as an Administrative
2 Assistant/Office Manager Ms. Hutzenbiler was subject to a one year probationary
3 period. Her position was not in the American Federation of State, County and Municipal
4 Employees (AFSCME) Administrative Support and Investigator Staff bargaining unit of
5 OPD .
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8 The general grievance procedure applicable to State of Montana employees applies to
9 workers not subject to collective bargaining agreements so to that extent Ms.
10 Hutzenbiler's position was subject to this generic grievance procedure. However,
11 2.21.8012 (c) of the State grievance policy excludes from the definition of "employee"
12 any worker who "has not completed a probationary period or a probationary period is
13 extended and the employee has to attain permanent status". Under 2-18-101 (19) MCA
14 "Permanent status", "means the state an employee attains after satisfactorily completing
15 the appropriate probationary period". Thus, as an Administrative Assistant/Office
16 manager Ms. Hutzenbiler could not avail herself of the non-union grievance procedure
17 until she completed her one year probationary period and gained permanent status.
18

19
20 In January of 2009 the OPD determined that it no longer needed "to have an individual
21 assigned responsibilities of providing day to day supervision of support staff". As a
22 result, Ms. Hutzenbiler was given the option of leaving her employment with OPD, or
23 remaining with OPD in a Legal Secretarial position. Ms. Hutzenbiler opted for the
24 second choice and began work in that position effective February 2, 2009. Effective this
25 date she became subject to the terms of the AFSCME collective bargaining agreement.
26 At this same time, because she had yet to attain permanent status, she also became
27 subject to a six month probationary period. The collective bargaining agreement
28 actually provides for a one year probationary period – Article 8 – Job Security, but
29 seemingly Ms. Hutzenbiler was credited with her previous employment time toward
30 permanent status. Nonetheless, her rights under the collective bargaining agreement
31 were somewhat limited until August of 2009 when permanent status would be attained.
32 The above is pointed out as there must be a realization that as a non-permanent status
33 employee Ms. Hutzenbiler's rights were limited in both a union and non-union setting.
34 That has to be taken into consideration when reviewing her complaint.
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37 Although she had documented many issues she had with co-workers and working
38 conditions during her tenure with OPD the investigator can find only one instance where
39 Ms. Hutzenbiler actually utilized an established grievance procedure - one actually
40 reduced to writing - either under the union contract or the generic State of Montana
41 grievance procedure. This non-union grievance was filed in February of 2009 and
42 concerned her change in job assignments. In response to this grievance Barb Kain of
43 the OPD Human Resource Office, responded correctly pointing out the limited access to
44 grievance procedures available to Ms. Hutzenbiler. Ms. Kain nonetheless went on to
45 address the issues raised by Ms. Hutzenbiler and concluded her response with an open
46 door statement that she was available to answer any further questions. Other than this
47 one documented use of one specific grievance procedure Ms. Hutzenbiler has offered
48 no other instances wherein she actually filed a grievance against the OPD involving
49 contract interpretation or policies subject to the generic grievance procedure. She has
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1 clearly documented other instances where she has had complaints about issues in the
2 OPD and to whom she has addressed these complaints, but none of them involve any
3 protected rights under the Collective Bargaining for Public Employees Act – 39-31-101
4 et seq. MCA.

5
6 The culminating events that led to Ms. Hutzenbiler's separation from OPD began on
7 January 27, 2010, when Ms. Hutzenbiler sent an e-mail to her supervisor reading:
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10 I wanted to let you know that I will be meeting with my doctor Friday morning and
11 based upon his findings will likely be resigning from my position due to health
12 issues caused by this office. My resignation will be effective Friday at 5:00 p.m.
13

14 That same day, as well as on January 28, 2010, Ms. Hutzenbiler was observed, and
15 she acknowledges, packing and removing personal items from her office space. By this
16 time Ms. Hutzenbiler's supervisor had forwarded what he viewed as her resignation to
17 others in OPD. Ms. Hutzenbiler had also addressed her possible resignation with Ms.
18 Kain. The result of this was that on January 28, 2010, OPD elected to accept what they
19 viewed as Ms. Hutzenbiler's resignation as effective on the 28th.
20

21 E-mails were then exchanged between Ms. Kain and Ms. Hutzenbiler wherein the two
22 disagreed on the nature of Ms. Hutzenbiler's separation from OPD with Ms. Hutzenbiler
23 believing she was fired and Ms. Kain believing Ms. Hutzenbiler resigned. Ms.
24 Hutzenbiler subsequently filed for unemployment and the Unemployment Insurance
25 Division issued a decision on April 1, 2010 finding:
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27
28 You were discharged after you sent an e-mail to David Duke [Ms. Hutzenbiler's
29 supervisor] informing him you might be resigning your position effective 5:00 p.m.
30 Friday 01/29/2010, if that was your physician's recommendation during your
31 medical appointment on 01/29/2010. It is understandable that your employer
32 could assume you would be leaving when taking into consideration your earlier
33 conversation with Barb Kain [OPD Human Resource Officer] and the fact that
34 you appeared to be cleaning out your office. However, on 01/28/2010, when
35 your employer ended your employment, you had not yet seen your physician,
36 and your employer did not confirm with you that you were indeed going to leave
37 your employment. Your employer was the moving party in this separation, and
38 an intentional disregard of your obligation to your employer has not been
39 established. Therefore, your discharge was not for misconduct under
40 Unemployment Insurance Law, Section 39-51-2303 Montana Code Annotated.
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43 Although it did not agree with its entire content, OPD elected to not appeal this decision,
44 but suffice to say, OPD continues to believe that Ms. Hutzenbiler resigned from her
45 position.
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47 Ms. Hutzenbiler never did file a grievance under the AFSCME grievance procedure
48 although she was past probationary status and could have filed a grievance with OPD
49 over her separation. Ms. Hutzenbiler, in a separate charge against her union contends
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1 AFSCME was negligent in not pursuing her separation, but again, regardless of that
2 allegation, Ms. Hutzenbiler never filed a grievance with her employer.
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4 As previously stated Ms. Hutzenbiler is alleging she “was terminated without cause
5 which was determined by the Unemployment Division”. For purposes of unemployment
6 eligibility Ms. Hutzenbiler is correct in saying that for unemployment purposes she was
7 terminated without cause, particularly since the decision of the Unemployment
8 Insurance Division was never appealed. Whether she quit or was discharged is not the
9 issue before the Board of Personnel Appeals and a non-appealed decision determining
10 unemployment eligibility carries no weight for purposes of an unfair labor practice
11 complaint. The issue before the Board is whether or not there is probable merit to the
12 complaint of Ms. Hutzenbiler that OPD violated 39-31-401(4) MCA which provides that it
13 is an unfair labor practice for an employer to “discharge or otherwise discriminate
14 against an employee because he has signed or filed an affidavit, petition, or complaint
15 or given any information or testimony under this chapter”.
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18 Whether she was discharged or not is clearly disputed, but, arguendo, even if Heather
19 Hutzenbiler was discharged as she contends, it was not because she engaged in any
20 protected, bargaining related activities. The same is true if she quit. Ms. Hutzenbiler’s
21 employment did not end because she filed grievances, testified, provided information,
22 petitions or otherwise engaged in activities protected under Chapter 31 of Title 39 of the
23 Montana Code Annotated. There simply is no substantial evidence offered that
24 demonstrates Ms. Hutzenbiler engaged in such activities to any appreciable degree let
25 alone that any such activities, limited as they might have been, led to any violation of
26 39-31-401 (4) MCA or for that matter any other portion of Chapter 31, Title 39 by OPD.
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30 **III. Recommended Order**

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32 It is hereby recommended that Unfair Labor Practice Charge 41-2010 be dismissed as
33 without merit.
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37 DATED this 14th day of July 2010.
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41 BOARD OF PERSONNEL APPEALS
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44 By: _____
45 John Andrew
46 Investigator
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3 NOTICE
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5 Pursuant to 39-31-405 (2) MCA, if a finding of no probable merit is made by an agent of
6 the Board a Notice of Intent to Dismiss is to be issued. The Notice of Intent to Dismiss
7 may be appealed to the Board. The appeal must be in writing and must be made within
8 10 days of receipt of the Notice of Intent to Dismiss. The appeal is to be filed with the
9 Board at P.O. Box 201503, Helena, MT 59620-1503. If an appeal is not filed the
10 decision to dismiss becomes a final order of the Board.
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13
14 CERTIFICATE OF MAILING
15

16 I, _____, do hereby certify that a true and correct copy
17 of this document was mailed to the following on the _____ day of July 2010, postage
18 paid and addressed as follows:
19

20 HEATHER GALLAGHER HUTZENBILER
21 1151 HOWARD AVE #4
22 BILLINGS MT 59102
23

24
25 GREG MARTIN
26 STATE OFFICE OF LABOR RELATIONS
27 PO BOX 200152
28 HELENA MT 59620 0152
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